IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 408/2005

Shri Kanhoba Vishnu Raul,
Sarpanch, Village Panchayat of Alarna,
R/o. H.No.60, Talarna Village,
Pernem Taluka, Goa. ..... Petitioner.

V/s.

1. State of Goa, through Secretary,
   Panchayat, New Secretarial Complex,
   Alto Porvorim Goa.

2. The State Election commissioner,
   having Office at Junta House,
   Panaji, Goa.

3. Shri Devanand Laxman Arondekar,
   Panch/Member of Village Panchayat,
   Alarna, r/o. Khutwal Village,
   Pernem Taluka, Goa. ..... Respondents.

Shri S. D. Lotlikar, Senior Advocate with Mr. S.Y. Thali, Advocate for the petitioner.

Shri S.S. Kantak, Advocate General with Ms. G. Bhonsule, Addl. Govt. Advocate for respondent No.1.

Shri V. P. Thali, Advocate for the respondent No.2.

Shri Deepak Gaonkar, Advocate for respondent No.3.

CORAM : R.M.S. KHANDEPARKAR &
N.A. BRITTO, JJ.

DATE : 30TH JANUARY, 2006.

ORAL JUDGMENT : (Per R.M.S. KHANDEPARKAR, J).

Heard Advocates for the parties. Perused the records.

2. The petitioner challenges the Order dated 21.10.2005 passed by the State Election Commissioner, Panaji in Petition No.3/05 on the ground that the same is contrary to the provisions comprised under Section 11 of the Goa Panchayat Raj Act, 1994 (hereinafter, referred to as "the said Act") as also being contrary to the decision of the Apex Court in the case of **Brundaban Nayak v. Election Commission of India and another,** reported in AIR 1965 SC 1892.

3. A few facts relevant for the decision are that :

The petitioner herein was elected as the Sarpanch of the Village Panchayat of Alarna in Taluka Pernem along with respondent No.3 as Panch. Subsequent to the election of respondent No.3 as member of the Panchayat, he applied for employment in service of the State Government under the Pre-Employment Training Scheme in the year 2004 and, accordingly was posted as full time Trainee Lower Division Clerk in the Directorate of Animal Husbandry & Veterinary Services at Patto, Panaji, Goa pursuant to an order dated 25.6.2004 issued by the Under Secretary, Department of Personnel, Government of Goa. Consequent to his appointment in the said post, he was drawing salary as full time trainee employee of the

Government of Goa while drawing the necessary allowance as member of the Panchayat. According to the petitioner, since respondent No.3 had accepted the full time employment, he had incurred disqualification for the membership of the Panchayat in terms of the provisions comprised under Section 10(c) of the said Act. Consequently, the petitioner moved an application before the Election Commissioner for declaring the respondent No.3 as having ceased to be the member of the Panchayat on account of the said disqualification, simultaneously praying for ex parte relief against the respondent No.3 from functioning as member of the Panchayat. The Election Commissioner, after hearing the petitioner passed the impugned Order dated 25.10.05 rejecting the application for interim relief though admitted the petition for final hearing. Hence, the present petition.

4. The learned Senior Advocate appearing for the petitioner submitted that the Election Commissioner erred in dismissing the application solely on the basis of the decision delivered by the Division Bench of this Court in the matter of **Shri Mafaldo Fernandes vs. Shri Kushali S. Kalekar and others**, reported in 1996(2) Goa L.T. 46. According to the learned Senior Counsel, the provisions comprised under Section 11 of the said Act nowhere impose any restriction as regards the authority or an individual who can refer the matter to the Election Commission relating to the

dispute pertaining to the disqualification of a member of Panchayat. He also submitted that in that regard the decision of the Division Bench was also misconstrued by the Authorities. Our attention was also drawn to the decision of the Apex Court in the case of **Brundaban Nayak v. Election Commission of India and another (supra).** The learned Advocate appearing for the respondent No.2 also fairly submitted that the provisions of Section 11 of the said Act are in pari materia with the provisions comprised under Auricle 192 (1) of the Constitution of India and the decision of the Apex Court in relation to the said Article would squarely apply to the facts of the case in hand.

5. A perusal of the impugned order discloses that the learned Election Commissioner has refused to entertain the application for interim relief solely on the basis of certain observations made in the matter of S**hri Mafaldo Fernandes (supra),** without considering the law comprised under Section 11 of the said Act.

6. Section 11 of the said Act provides that if any question arises as to whether a member of a Panchayat has become subject to any disqualification referred to in Section 10, it shall be referred to the State Election Commission for decision and its decision thereon

shall be final. Section 10 enumerates various instances of disqualification for membership. Accordingly, in terms of clause (c) thereunder, if a member holds any office of profit under any local or other authorities subject to the control of the Central Government, State Government or the Government of any other State, other than such offices as are declared by rules made under the said Act not to disqualify the holder, then such person would be disqualified for being chosen as and for being a member of the Panchayat. Indeed, it is on this count that the application was moved by the petitioner before the State Election Commissioner complaining that the respondent No.3 being a holder of office of profit under the State Government he has rendered himself to be disqualified to continue as member of the Panchayat.

7. Section 11 of the said Act, undoubtedly, states that when the matter relates to the subject of disqualification of the nember of the Panchayat on the grounds enumerated under Section 10, it has to appear before the State Election Commission on being referred to it for the decision in that regard. However, Section 11 on the face of it nowhere states that such reference of the matter to the State Election Commission should be at the instance of any specific authority. There is no provision under the said Act specifying any such authority which could alone refer such matter to the State Election Commission. Being so, merely because Section 11 uses the

phrase `referred to', it cannot be said that the matter has to appear before the State Election Commission only on a reference by the Panchayat or by any other authority as such. What is relevant is that the subject matter of the reference before the Election Commission should relate to the disqualification of the member of the Panchayat. Once the matter relates to the subject of disqualification of member, it is immaterial whether it is referred to by the Panchayat or by any individual who has cause of action to raise such dispute regarding disqualification of the member.

8. Indeed, as rightly submitted, the provisions of Article 192 (1) of the Constitution of India provides that if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final. Article 191 enumerates instances of disqualification for membership and Clause (a), of sub-Article (1) thereof relates to disqualification on account of the member holding an office of profit under the Government of India or the Government of any State specified in the First Schedule other than an office declared by the Legislature of the State by law not to disqualify its holder. While dealing with the provisions of law comprised under Article 191(1), the Apex Court in the case of **Brundaban Nayak (supra),** had held thus :

> "What the said clause requires is that a question should arise; how it arises, by whom it is raised in what circumstances it is raised, are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type mentioned by the clause should arise;".

While holding so, the Apex Court had rejected the contention that before the question being referred to the Governor, there should be some investigation in the matter regarding the complaint relating to the disqualification of membership as also that the reference should be by any particular authority.

9. As already seen above, Section 11 of the said Act is in pari materia with the provisions comprised under Article 192(1) of the Constitution of India. Bing so, the decision of the Apex Court in relation to Article 191(1) squarely applies to the cases arising under the provisions comprised under Section 11 of the said Act and, hence, it cannot be said that before the matter being referred to the State Election Commission regarding the disqualification of any member of the Panchayat, there has to be any investigation either by the Panchayat or any other body or that the reference shall necessarily be by the Panchayat or any other authority.

10. The Division Bench of this Court in the case of **Shri**

Mafaldo Fernandes (supra) had undoubtedly made certain observations in relation to the provisions of law comprised under Sections 10 and 11 of the said Act. However, it is to be noted that those observations were made in relation to the dispute regarding disqualification having been considered by the Panchayat and the decision in that regard being informed to the concerned member. It does not lay down any broad proposition of law as such that in no case an aggrieved person can approach the Election Commission under Section 11 and that in each and every case the matter necessarily has to be primarily investigated by the Panchayat and only thereupon the matter has to be referred to the Election Commission necessarily by the Panchayat and that too in case the aggrieved person disputes the validity and legality of the decision arrived at by the Panchayat. In any case, the observations cannot be understood ignoring the decision of the Apex Court in the **Brundaban Nayak's case.** Being so, the decision by the learned Election Commissioner solely on the basis of certain observations of the Division Bench of this Court cannot be held to be in consonance with the provisions of law comprised under Section 11 of the said Act, read with the decision of the Apex Court in **Brundaban Nayak's case** and on this count itself, therefore, the impugned order is liable to be set aside and the matter to be remanded to the State Election Commission to deal with the application filed by the petitioner in accordance with the provisions of law. We make it clear that we have

not expressed any opinion on merits of the case.

11. In the result, therefore, the petition succeeds. The impugned order is hereby set aside and the matter is remanded to the State Election Commissioner to decide the application afresh, in accordance with law, and bearing in mind the observations made herein above. The Rule is made absolute, with no order as to costs.

R.M.S. KHANDEPARKAR, J.

N.A. BRITTO, J.

ssm.